No. 16,448

United States Court of Appeals

For the Ninth Circuit

GREGORIO ARCIAGA MESINA,
Appellant,

vs.

RICHARD C. HOY, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

This is an appeal from a decision of the District Court denying declaratory and injunctive relief as to appellant under 28 U.S.C.A. 2201 and 5 U.S.C.A. 1009.

Appellant Mesina was born in the Philippines in 1903 and at birth was a national of the United States. He first entered the United States in 1924 and lived continuously either in continental United States or Puerto Rico from 1924 until 1936. Mesina obtained a declaration of intention No. 13624 at New Orleans, Louisiana on May 11, 1929 and was a lawful perma-

nent resident of the United States in 1936 when he was deported to the Philippines on the charge of managing a house of prostitution. Subsequent to his deportation he was employed by the Department of the Navy of the United States from 1946 until 1954.

The Court below in its findings of fact found that plaintiff had been ordered deported on the grounds that as a non-immigrant he had remained in the United States longer than permitted, in violation of Section 241(a)(2) of the Act of 1952 (8 U.S.C. 1251 (a)(2)), and sustained the Immigration and Naturalization Service in such order. The charge of the order to show cause shows that the appellant entered the country lawfully and remained longer than authorized. That this charge is unsupportable on this record is manifest. Mr. Mesina was previously deported and could only seek admission to the United States if he had applied to the Attorney General under Section 212 (a)(17) (8 U.S.C. 1182(a)(17)). He had not applied for such permission and could not have been legally authorized to enter the country under Section 101(a)(15) (8 U.S.C. 1101(a)(15)) as a non-immigrant or otherwise because of the prior deportation. It has been held that a landing crew permit such as that obtained by appellant without knowledge of the prior deportation, does not constitute a consent to reapply. See *U. S. v. Bakouros,* 160 F. Supp. 173 (E.D. Pa. 1958). See also Immigration Law and Procedure, by Gordon and Rosenfield, Section No. 2.33, pages 220-222. Hence the appellant cannot lawfully be deported on the sole charge made on the order to show cause.

The facts now of record—recorded on reopening by direction of the Board of Immigration Appeals—establish that plaintiff is identical with the Gregorio Mesina who (a) had lawfully entered the United States for permanent residence in 1931; (b) was deported to the Philippines in 1936; (c) was deported as a member of one of the classes enumerated in Sec. 242(e) of the 1952 Act (8 U.S.C. 1252(e)); and (d) re-entered in 1956 without having been granted permission to reapply. In accordance with the Board of Immigration Appeals' order of December 12, 1957, the complete record of the prior deportation of plaintiff was admitted in evidence as Exhibit 5 (R. 10).

On the present record, the only appropriate charge is under Sec. 242(f) of the 1952 Act (8 U.S.C. 1252(f)): The decision of the Board of Immigration Appeals dated December 12, 1957, was rendered on a deficient record, in that the official record of deportation of plaintiff in 1936 was not in evidence; the Board of Immigration Appeals ordered reopening of the case for a determination as to whether plaintiff was deported in 1936 pursuant to law, and for recordation of all available official information respecting such deportation. On the present record, and on the authority of the law, the regulations and *U. S. ex rel. Blankenstein v. Shaughnessy,* 112 F. Supp. 607, it is submitted that on this record the charge must be laid under Sec. 242(f) of the 1952 Act (8 U.S.C. 1252(f)). The Board apparently relied upon *Blankenstein,* supra, for the proposition that "there is no automatic

reinstatement of the previous order of deportation," for as the Court said (at 610):

> "Section 242(f) (8 U.S.C. 1252(f)) specifically provides: 'Should the Atty. General find that any alien has unlawfully re-entered the United States after having previously departed or been deported pursuant to an order of deportation * * * the previous order of deportation shall be deemed to be reinstated from its original date * * *' Thus, the Attorney General is required to make a finding (1) that the alien whose deportation is now sought is the same person against whom the previous order of deportation was issued; (2) that he either previously departed or had been deported as a member of the classes enumerated in Sec. 242(e) of the Immigration and Nationality Act (8 U.S.C. 1252(e)); and (3) that he had unlawfully re-entered. 8 CFR Sec. 242.75. Then, and only then, is the previous order of deportation reinstated."

The regulations as revised January 1, 1958, provide:

> "Sec. 242.6. Aliens deportable under Section 242(f) of the act (8 U.S.C. 1252(f)). In the case of an alien within the purview of Section 242(f) of the act, the order to show cause shall charge him with deportability only under Section 242(f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section."

The record as now constituted establishes all of the prerequisites of the statute, the regulations and in-

terpretation thereof. The requirement of the statute and of the regulations is mandatory. Hence, no other charge can be made or, if made, can not lawfully be sustained.

We respectfully call to the attention of this Court that, as part of the conclusions of law by the District Court, it is stated in paragraph I that plaintiff was accorded *due process in all the proceedings* by the Immigration and Naturalization Service (italics supplied). It is our purpose and, as part of this brief, we intend to show that not only was Mr. Mesina not accorded due process but that there was a basic disregard of due process in the following respects:

1. The warrant of arrest leading to the original deportation was unlawfully issued.

2. The conduct of the hearing officer as a detective, policeman, prosecutor, notetaker, interpreter and judge was, in 1935-1936, and is today, in violation of our basic concepts of due process.

3. Appellant was not accorded the right to cross-examine declarants of unsigned ex-parte statements introduced into evidence in violation of due process.

4. Hearing officer months after the hearing made secret representations to the Board of Review unknown to the appellant or to his attorney.

In addition to the above, one other aspect of the record merits most serious consideration, that is, the status of appellant in 1935-1936.

Plaintiff was not an alien in 1935 and 1936. This proposition is established by the decision of the Supreme Court in *Rabang v. Boyd,* 353 U.S. 427, holding that persons born in the Philippine Islands and permanently resident in the United States "became aliens on July 4, 1946." Irrespective of any technical rules, it is submitted that where a finding of alienage was made, or was assumed (as in the original warrant of arrest), contrary to law, that basic error of law robs the prior deportation of any validity.

No interpretation of the law could have held plaintiff to be an alien until the Philippine Independence Act became effective; the Act was passed by Congress in March, 1934, but was by its terms not to be effective until the Philippine people accepted it. "Formal acceptance became effective May 14, 1935." *Del Guercio v. Gabot,* 161 F. 2d 559. Had plaintiff been considered to be an alien as of May 14, 1935, any conduct alleged to subject him to deportation would have had to occur subsequent to May 14, 1935. Note that in the case cited by the Special Inquiry Officer—Matter of O, III I&N Dec. 155, at page 158 the Board refers to the alien's misconduct as having occurred "after the effective date of the Independence Act." There is really no evidence in the 1935 record which would even allege, much less prove, such misconduct after May 14, 1935—note, again, that the telegraphic warrant of arrest and application were dated June 25, 1935, and as we shall later see, there was no evidence whatever of record at that time.

This argument was presented to the Board of Immigration Appeals but said Board made no answer to this charge or any other referring to the fact that plaintiff was not an alien but a national at the time the alleged acts were said to be performed.

In respect to the other denials of due process we next wish to consider the warrant of arrest which furnished the basis upon which the deportation hearing was held.

The warrant of arrest was unlawfully issued: The opinion of the Board of Immigration Appeals is erroneous in that it asserts that the warrant of arrest was based on the sworn statements of five persons—the request for the warrant came approximately six weeks before any such sworn statements.

Rule 19, Subd. B of the regulations in force in 1935 required that the warrant of arrest application

> "must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry * * * and should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government * * * the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an Inspector. * * * Telegraphic application may be resorted to only in case of necessity,

> or when some substantial interest of the Government would be observed thereby, and must state * * * the substance of the facts and proof contained in such application."

These requirements were further provided for by informal instructions disseminated by the Service in Lecture No. 22, November 12, 1934, "Warrant and Deportation Procedure," whose author, W. W. Brown, was then head of the Warrant Division of the Department; the gist of the regulation is repeated, and the purpose of the foregoing requirements is indicated by the statement in his lecture that

> "The applications, together with supporting evidence, are reviewed at the Central Office by officers especially qualified for that purpose and if a prima facie case is established, a warrant of arrest signed by the Secretary or one of the assistants is issued."

The telegraphic warrant of arrest was applied for in this case, without compliance with the lesser requirements regarding the necessity or substantial interest of the Government, and without compliance with the basic requirements as to "substantial supporting evidence". In fact, the telegraphic application did not state the substance of the facts and proof which were supposed to support the regular application, evidently because the regular application was not so supported; the sole alleged basis for the application was a memorandum of Robert J. Leith, Immigrant Inspector, to the District Director, which stated:

"In re: George Messina.

It has been reported to this office from sources considered to be reliable that a Filipino known as George Messina is the proprietor of a house of prostitution. It is further stated in the report that Messina has four or five Porto Rican girls living in his house, where they are practicing prostitution.

It is, therefore, respectfully suggested that a cablegraphic warrant of arrest be applied for in this case."

The formal application for the warrant of arrest, not received by the Central Office until July 2, 1935, was as much in violation of the regulations as the telegraphic application, since neither was accompanied by substantial supporting evidence, or in fact by any evidence at all. The hearsay statement of Inspector Leith was in direct conflict with the regulation and consistent instructions—he made no effort even to take a statement from the "sources" of which he spoke, much less an affidavit or transcript of a sworn statement—it was simply rumor. It is deemed fair comment to say that, the lack of basis for the application for the warrant may have even dictated the use of cable or telegraph—to avoid the specific requirements of the regulation.

The importance of obeying the regulations with regard to the application for, and issuance of, warrants of arrest may perhaps be noted by reference to the leading case of *Whitfield v. Hanges,* 222 Fed. 745 at page 749. Failure to adhere to the rule that the application for the warrant must be supported by

substantial evidence, and an accompanying failure to show or read to the alien the evidence upon which the warrant had been issued rendered the proceeding unfair from its inception—and rendered the hearing unfair; *Sibray v. U. S.,* 282 Fed. 795, 796; *Ex parte Radivoeff,* 278 Fed. 227; and *Whitfield v. Hanges,* supra. Manifestly plaintiff could not have had notice of any evidence which was supposed to support the warrant of arrest, and concomitant opportunity to refute that evidence, because there was no scintilla of evidence to support the application and no such notice and opportunity could have been afforded. The allegation of Inspector Leith (1935 R. 3) that the ex parte statements Exhibits A, B, C, D and E were "evidence on which the warrant of arrest is based" could not be true, since the earliest date on any such reported statement is August 6, 1935, (Ex. B), and the others are all dated later, whereas the warrant application and warrant are dated June 25, 1935.

The next point to be considered is the conduct of the hearing officer.

The 1935 hearing officer intermingled the functions of detective, policeman, prosecutor, notetaker, interpreter and judge.

As indicative of what were approved practices in deportation hearings in 1935, we note that in Lecture No. 1, February 12, 1934, then Commissioner D. W. MacCormack, initiating the series of lectures intended to guide the future conduct of Service personnel, stated (inter alia) that some of the worst criticisms

of the Service had been the "failure to realize that its function is primarily judicial in nature," "third-degree methods," and "the practice of having the same inspector as investigator, arresting officer and trial officer." In Lecture No. 22, November 12, 1934, W. W. Brown stated (p. 5):

> "in the past, formal hearings have frequently been conducted by the same officer who conducted the preliminary hearing and investigation. At the present time, however, and wherever possible the hearing is given by some officer other than the investigating officer. When it is found that the alien is unfamiliar with the English language to the extent he is unable to comprehend the proceedings, a competent interpreter is employed at Government expense."

In this case, Inspector Leith carried on all functions from beginning to end, with nothing of record to indicate why he was chosen to perform all of the varying and inconsistent duties. Perhaps the most damaging ex parte statement alleged to have been taken by Inspector Leith is the reported statement of one Marta R. Caraballo, which was introduced in evidence over objection (1935, R. 3). In the purported taking of this statement, Inspector Leith played the whole role alone—he was investigator, interpreter and (apparently) note-taker. The purported statement of Perez was not even signed—it could not have been, because as shown by the notes of stenographer-interpreter Ramirez, the alleged transcript was merely a transcript of "my shorthand notes regarding this sworn statement, as dictated to me by

Inspector Robert J. Leith." How it was possible for Inspector Leith to have remembered what to dictate, and whether he had the capacity of translating or interpreting from the Spanish language (used by Perez) and the English language (which he dictated to Ramirez), are but two unexplained mysteries in the picture of gross unfairness.

These facts exemplify and document how Inspector Leith initiated the charges on stated hearsay from undisclosed sources, without supporting evidence of any kind, and then endeavored to carry his charges through to the conclusion of plaintiff's deportation—sometimes the Inspector being the only person present when a witness was alleged to have made a sworn statement to him in a foreign language. Standing alone, the failure to establish of record that a "competent interpreter" was used in the proceedings constitutes the denial of a constitutional right and renders the hearing unfair; *Gonzales v. Zurbrick,* 45 F. 2d 934 (C.C.A. 5, 1930). Moreover, there is nothing of record to indicate why Inspector Leith was permitted to discharge his many immiscible functions to this amazing point.

During the very course of the "hearing", with the Inspector sitting as prosecutor and judge (on the morning of the last day of the hearing, September 17, 1935), the testimony of witness Burgos, called as a witness by Inspector Leith (1935, R. 27) shows: That the inspector, accompanied by the person who was interpreter at the hearing, entered the house of Burgos without permission; Burgos, as the Inspec-

tor's witness, testified (R. 30) that "they lost their temper," "he (Leith) went up in the air," "he lost his temper and threatened me if I would not come to testify" (against the plaintiff); that Inspector Leith was in full uniform and "had a pistol on his hip." The questioning of Burgos by the Inspector is replete with questions regarding "the Filipino", without any identification as to the person to whom the Inspector was referring. Witness Burgos finally asked this question of Inspector Leith:

> "A. No, sir, I don't know the Filipino. I don't know anything about him. Who is the Filipino?"

Instead of answering this question, Inspector Leith did this:

> "Examining Officer: No further questions."

When the case was reviewed by an examiner for the Board of Review (1935 recommendation, p. 7) the examiner completely garbled these facts:

> "Burgos further testified when asked whether he said the Filipino's house was a house of prostitution, 'No, I don't know the Filipino, I don't know anything about him. Who is the Filipino?' At this point the attorney refused to continue with the case and advised his client to answer no more questions."

The egregious error of this finding is that it was Inspector Leith who closed the examination of his own witness, after having failed or refused to identify to the witness the "Filipino" about whom he

had been asking questions, and it was after an exchange of stenographer-interpreters (caused by the fact that the Inspector had had the stenographer testify to try to impeach his own witness) that the attorney stated that he declined to permit plaintiff to be again cross-examined, since he had already been cross-examined, previously. And the attorney did not refuse to continue with the case, since he stated (R. 31):

> "* * * I have no more witnesses except to cross-examine a girl confined in the Insular Sanatorium."

Inspector Leith did not even deign to acknowledge this further demand for cross-examination of the girl whose statement he had purported to take in the Sanatorium, and closed the case with the addition of the charge "Receiptor" over the objection of counsel, without giving either plaintiff or his counsel any opportunity whatever to answer or produce evidence on that charge. As stated in *U. S. v. Van de Mark,* 3 F. Supp. 101, when one man acts as "inquisitor, interpreter, prosecutor and judge"

> "The trial moves rapidly on when the judge has determined the sentence beforehand."

The third point to be considered is the right of cross-examination of witnesses which was refused: As pointed out above, Exhibit A in the 1935 hearing, the alleged sworn statement of one Marta Rodriguez Carabello, purporting to have been taken from her in a sanitarium, but actually dictated by Inspector Leith

to a stenographer at some other time and place, and unsigned by her, was introduced in evidence over the objections of counsel; over and over again, counsel specifically requested the right of cross-examination of all of the persons from whom the inspector took statements. Even though this woman is reported to have stated that she would be willing to appear as a witness, up to the very last few minutes of the hearing, counsel's repeated demands were ignored. Notwithstanding, the Board of Review recommendation relied upon this woman's statement, Exhibit A, and the other four purported statements, as "the principal evidence in support of the charges against the alien." The Board examiner merely noted the objections of counsel as to Carabello and stated: "It appears probable that her testimony might have been taken by going to the institution for the purpose, but this was not done."

As to Josefina Ruiz (Ex. D, 1935) the refusal of the Inspector to call her for cross-examination was excused by the Board examiner on the statement that "possibly because her statements were not as clear and definite in support of the warrant charges as those of the other witnesses." In other words, because the ex parte witness Ruiz had given a statement quite favorable to the plaintiff, and which did not "support the warrant charges," the Inspector refused to call her as a witness at the hearing and contented himself with introducing her ex parte statement, and denying any examination of her by counsel.

The serious consideration given to at least two ex parte statements as part of the "principal evidence" to sustain the warrant charges against the respondent, where the makers of the statements could have been produced at the hearing, renders the hearing and decision unfair; *Ungar v. Seaman,* 4 F. 2d 80 (C.C.A. 8, 1924); *Whitfield v. Hanges,* supra; *Schenck v. Ward,* 6 F. Supp. 739; *Ex parte McMahon,* 1 F. 2d 456; *Ex parte Chin Loy Yow,* 223 Fed. 833; *Gonzales v. Zurbrick,* supra; *Svarney v. U. S.,* 7 F. 2d 515; and *Maltez v. Nagle,* 27 F. 2d 835. It seems more than significant that the cases wherein such practices of the Service have been most severely criticized are those involving charges that the respective respondents were engaged in the managing of houses of prostitution, and the "evidence" relied upon consisted of statements of members of that oldest profession in the world—as in *Whitfield* and *Svarney,* supra.

(5) The Inspector made secret representations which influenced the Board of Review: Months after the hearing was completed, the record was forwarded by the District Director at San Juan to the Commissioner (January 2, 1936). Contrary to the practice prescribed in Lecture 22, the District Director himself made no recommendation to the Commissioner; this was error, of course. The only recommendation was made by Inspector Leith, who recommended plaintiff's deportation. To this, the Inspector appended a pageful of statements headed up

"Comments by Inspector Leith"

These comments consisted in attacks upon the testimony of eight witnesses, whose testimony in open hearing was favorable to the plaintiff. As an example, the Inspector attacked the testimony of witness Jenaro de Jesus by stating that this witness had not reported to the authorities an alleged house of prostitution next door to Mesina's house.

The record shows that witness de Jesus was not asked if he knew that there was a house of prostitution further down the street or in the vicinity and he was not asked as to whether, if he knew of the existence of such a place, he had or had not reported it to the authorities. Additionally, there is no evidence of record that he had not made such a report. The Inspector went on to suggest and request that the testimony of each and every witness favorable to plaintiff "be not considered" in his (plaintiff's) behalf and favor.

We next find that the allegations of Inspector Leith in his "comments" were not known to plaintiff or his counsel, who had no notice of them and no opportunity to rebut them. Notwithstanding, turning to page 4 of the Board of Review recommendation, we find the Board examiner adopting in toto the unfounded and unsupported statement regarding witness de Jesus, and, in fact, adopting virtually completely all of the "comments" of Inspector Leith.

The case of *Ungar v. Seaman,* supra, is relied upon by the Special Inquiry Officer in this case as the leading case on matters related to fairness of hear-

ing; in that case the Circuit Court of Appeals (4 F. 2d at pages 84 and 85) said:

> "The introduction and receipt by the assistant Secretary of Labor, after the hearing was closed, without notice to or knowledge of the accused, of the hearsay statements of the immigration inspector * * * was grossly unfair and unjust. * * * Its receipt and consideration violated the indispensable condition of a fair hearing of a litigated issue that the case shall be decided on the evidence at the hearing, when parties or their counsel were present and that neither party nor court or quasi-judicial tribunal shall subsequently receive evidence without notice to the party to be affected or their counsel and time and opportunity to rebut it."

CONCLUSION.

We believe that the record in this case is such that the Court in examining all the proceedings will find that there has been a gross miscarriage of justice.

In view of the foregoing we respectfully submit that justice and fairness require that the decision of the District Court be held to be in error.

We therefore ask this Court to grant appellant the declaratory and injunctive relief which has been denied him by the District Court.

Dated, San Francisco, California,
September 21, 1959.

Respectfully submitted,
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Attorney for Appellant.